Supreme Court, U.S.
FILED
JAN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-826

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
a California corporation,
Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Constitution

Publications

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PETITIONER'S REPLY BRIEF

INTRODUCTION

When this case was decided by this Court in 1987 (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US 304) it was perceived by virtually all observers as a message to all parties involved in land use regulation (the regulators themselves, regulated property owners, neighboring property owners, and the courts which evaluate the validity of such schemes) that the scales of justice had been weighted too heavily in favor of the regulators and had failed to provide the protection to property owners guaranteed by the Fifth Amendment. (See commentaries cited in the Petition, pp 1-2.)

Two years after this Court's landmark decision remanded the case to the California court system to determine whether the *facts* of the case required application of the compensatory remedy mandated by the Just Compensation Clause, the California Court of Appeal decided that it could make that "ad hoc factual" determination[1] by itself — without a trial court evidentiary record — relying solely on the brief allegations in the complaint and selectively "judicially noticed" "findings" made by County administrative personnel on disputed factual issues, in non-adversarial proceedings, which had never been tested in the crucible of trial.

Because of the "high profile" of this Court's decision in this case, courts and regulators awaited the decision on remand to determine how the precepts established by this Court should be applied. In light of the California Court of Appeal's crabbed interpretation of this Court's opinion and its wilfull refusal to follow this Court's plain directions, other courts around the country are not applying this Court's landmark 1987 holding, reading the Court of Appeal's erroneous follow-up opinion as the definitive interpretation of this Court's decision. The Court of Appeal — following the lead of earlier California land use decisions before this Court's 1987 decisions — is evidently relying on the "odds" that this Court will deny review to insulate continuation of

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[1] This Court has repeatedly held that the determination of whether a regulation is a taking can only be made on an "ad hoc" case-by-case basis depending on the facts of the individual case. (*E.g.*, *Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 1004-1005.)

California's defiance of the clear command of the Fifth Amendment.[2]

If this Court meant to provide property owners the protection guaranteed by the Fifth Amendment when it decided this case in 1987, then the Court of Appeal's decision requires nullification — either by granting Certiorari in this case and clarifying the standards to be applied in adjudicating the Constitutionality of land use regulations, or by remanding the case to the California Court of Appeal forthwith, with instructions to reconsider its decision in light of this Court's prior decisions.[3] Without this Court's intervention, Fifth Amendment taking law will continue to be confused, resulting in a denial of the benefits of this Court's 1987 decision, with the Court of Appeal's opinion in this case aggravating the confusion and denigration of the rights of private owners.

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[2] A nationally recognized text describes the California judiciary's treatment of property owners as follows:

> "The striking feature of California zoning law is that the courts in that state have quite consistently been far rougher on the property rights of developers than those in any other state. In a fairly long series of cases, the California court has upheld restrictions on property rights which would not be upheld in many other states, and (in some instances) probably not in any other." (1 Williams, *American Land Planning Law* [rev ed 1988] §6.03 at 184)

[3] While out of the normal pattern, circumstances sometimes require repeated decisions by this Court in order to do complete justice in a case. (*See, e.g., Golden State Transit Corp. v. City of Los Angeles* [1989] ___ US ___, 58 USLW 4033.)

THE COURT OF APPEAL'S FACTUAL DETERMINATION OF THIS CASE WITHOUT EVIDENCE, BASED ON "JUDICIAL NOTICE" OF COUNTY FACTUAL ASSERTIONS WHICH HAVE NEVER BEEN SUBJECTED TO TRIAL, DENIED FIRST CHURCH DUE PROCESS OF LAW

Neither the brief filed by the County nor the presentation by its amicus, California, deals with the reality of what the California Court of Appeal did to the Petitioner (First Church) when it disregarded the plain intent of this Court's 1987 remand that the *facts* be examined to determine whether a taking had occurred.

Indeed, both governmental briefs implicitly acknowledge that the Court of Appeal's second dismissal of this case was in derogation of this Court's remanding opinion and settled due process precepts laid down by this Court:

- The County repeatedly acknowledges that the Court of Appeal was making specific factual determinations, not merely examining pleadings, although the County *says* that the Court of Appeal was merely deciding the question whether the complaint stated sufficient facts to constitute a cause of action (County, p 3).[4]

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[4] "[The Court of Appeal] simply concluded that petitioner was not entitled to any compensation *because* respondent's Interim Flood Protection Ordinance *did not amount to a taking*." (County 19; emphasis, the County's.)

"... the Court of Appeal expressly found that

(continued)

- California's brief likewise makes clear that the Court of Appeal was engaged in "fact finding" without a factual record.[5]
- Both the County and California emphasize that the Court of Appeal took judicial notice of County ordinances (County 6, 15, 16, 17, 18; California 5, 7), recognizing no problem in so doing.[6] Both, however, *ignore* that

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(ftn. continued)

respondent's Interim Flood Protection Ordinance *did not deny all reasonable use of the property.*" (County 21; emphasis, the County's.)

"... respondent's ordinance did not deny petitioner *all* beneficial use of its campground property." (County 23; emphasis, the County's.)

"The appellate court concluded that the mere enactment of the ordinance did not amount to a regulatory taking, precisely because ... it did not deny appellant all economically viable use of its property." (County 24-25)

5 "The Court of Appeal specifically found, contrary to petitioner's contention, that the interim flood safety ordinance did not deprive First English of 'all use' of its property." (California 8)

"Here ..., the Court of Appeal found that the safety ordinance besides being insulated as part of the State's authority to enact safety regulations, did not deprive petitioner of all use of its property." (California 9)

6 First Church did not object to the Court of Appeal taking judicial notice of the content of the *ordinance* here at issue. The County and California are thus attacking a straw issue never raised by First Church. What First Church objects to is the Court of Appeal taking judicial notice of County documents purporting to "find" that its ordinance leaves First Church with "buildable areas" (App A, p 21), thus "proving" that the ordinance did not effect a taking.

> the due process issue raised here by First Church was because the Court of Appeal did not stop with examination of the *law*, but *also* took judicial notice of County Planning Commission assertions of *fact* and used those "facts" to conclusively "find" on appeal that First Church retained viable uses for its property.

The abuse of the judicial notice procedure to permit a party to *prove* its case at the appellate level is a denial of due process of law, as discussed in the Petition. (Pet 10-11, discussing *Ohio Bell Telephone Co. v. Pub. Util. Commn.* [1937] 301 US 292, *Garner v. Louisiana* [1961] 368 US 157, and *Turtle Mountain Band of Chippewa Indians v. U.S.* [Ct Cl 1974] 490 F 2d 935, 945.) Such judicial action was condemned by this Court in no uncertain terms as permitting the decision maker to "wander afield" and make decisions "without reference to any evidence, upon proofs drawn from the clouds." (*Ohio Bell*, 301 US at 307) Indeed, the brief filed by California recognizes this problem when it states that:

> "*Garner* and *Ohio Bell* merely stand for the self evident proposition that appellate courts may not judicially notice facts which are properly in dispute and the province of the trier of fact." (California 6)

But this case is here for a second time because the Court of Appeal failed to recognize that "self evident proposition" and proceeded to judicially notice "facts" which *are* in dispute and thus needing fact finding after trial.

Contrary to the assertions of both the County and California (County 16-17, California 5-6, 11), *Agins v.*

City of Tiburon (1980) 447 US 255 has nothing to do with this issue.

In *Agins*, all that the California Supreme Court judicially noticed was the ordinance there in issue. Comparing that ordinance, which permitted from 1 to 5 single family homes on the subject property, with the property owners' desires to build from 1 to 5 single family homes, it was easy to conclude that no facial taking had occurred.

This case is different, because the Court of Appeal went beyond the terms of the ordinance being reviewed and relied on *factual* assertions made in reports of the County Planning Commission to make *factual* determinations about the impact of the ordinance. (App A, p 21) That sort of "judicial notice" is what this Court outlawed in *Garner* and *Ohio Bell.*

Review by this Court is needed to ensure the primacy of the Due Process Clause in the review of land use regulations.

THE COUNTY'S POSITION IS BASED ENTIRELY ON *ASSUMED* FACTS WHICH HAVE NEVER BEEN EXAMINED BY ANY TRIER OF FACT

The County steadfastly refuses to deal with the legal issues actually presented by this Petition. *All* of the County's legal discussion is premised on the *assumption* of the existence of facts which have never been found by any court with fact finding jurisdiction because there has never been a trial.[7]

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[7] The Court of Appeal's assumptions are discussed at pp 4-5 herein and at Pet 8-9.

For example, the County asserts:

> "It is true that this Court has never held that *all* economically viable use of a parcel of property could be denied for reasons of public safety, but neither has the Court ever been faced with a case where all possible economically viable uses were dangerous." (County 22; italics, the County's; underscoring added.)

There is no evidence in this record that "all possible economically viable uses were dangerous." If the County wishes to so contend, the place to do that is at trial, not in the Court of Appeal solely by judicial notice.

The County further asserts:

> "Since petitioner was free to carry on any camping and recreational activities on its property which did not require the construction of buildings, the building restrictions imposed on its neighbors necessarily would protect and benefit petitioner . . ." (County 24; underscoring added.)

There is no evidence in this record from which to conclude that First Church would benefit in any way at all because of draconian restrictions placed by the County on First Church's neighbors. Nor is there any evidence from which to conclude that the "uses" remaining to First Church were viable without the use of permanent structures.[8]

The County additionally asserts:

> "There is absolutely nothing in *Nollan* [*v. California Coastal Commn.* (1987) 483 US 825] which suggests that anyone has a

[8] Is the County seriously contending that children should camp in a flood hazard area protected only by tents?

> constitutionally protected 'right' to build on his property, if to do so would create a risk of harm to himself and others. If the rule were otherwise, all building and safety codes would be invalid." (County 27; underscoring added.)

There is no evidence in this record from which to conclude that *any* construction of buildings by First Church would create risks of harm to anyone. If the case were tried, engineers could present *evidence* as to appropriate building techniques which could provide some use to First Church without danger to life or property. But the County's strategy and the Court of Appeal's decision solely on County factual assertions without trial precluded any development of evidence of proper building techniques.

Nor is there anything to the County's hyperbolic claim that any view contrary to its own would require the invalidation of all building and safety codes. First Church has never advocated such an extreme position. What this Court said in *Nollan v. California Coastal Commn.* (1987) 483 US 825 was that property owners have a right to build subject only to reasonable regulation. That is all that First Church suggests at bench. (Pet 24)

The County's position — adopted and enforced by the Court of Appeal — requires this Court to accept speculation in place of evidence.

CONCLUSION

The County's brief does this Court a disservice. It fails to deal with the deprivation of due process created by the Court of Appeal's extensive factual assumptions without evidence. It fails to deal with the Court of

Appeal's disregard of this Court's 1987 remanding opinion. And it fails to deal with the adverse national impact of the Court of Appeal's evisceration of this Court's 1987 opinion.

By itself, the Court of Appeal's treatment of First Church furnishes sufficient grounds for this Court to summarily reverse and remand the case for proper treatment.

But the harm done to the law of land use on a national scale if the Court of Appeal's opinion is allowed to stand will be immeasurable. Lower courts seeking to apply this Court's *First English* opinion will seek guidance as to its meaning and application from the opinion of the California Court of Appeal on remand. That opinion is already being heavily cited by governmental regulators as the definitive interpretation of this Court's holding.

This Court's action is needed to preserve the protection guaranteed by the Fifth Amendment's Just Compensation Clause. First Church prays that Certiorari be granted.

Respectfully submitted,

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